

# OFFICE OF THE ATTORNEY GENERAL

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The Honorable Lewis Brown  
Sheriff, St. Clair County  
Pell City, Alabama 35125

## Sheriffs - Supernumerary Sheriffs - Retirement System

The legislative intent of the sheriffs' supernumerary law is that sheriffs elect whether to participate in the sheriffs' supernumerary program upon first entering office, but no time limit for such election is statutorily prescribed. A person may not participate in both the sheriffs' supernumerary plan and the Employees' Retirement System at the same time.

Dear Sheriff Brown:

This advisory opinion is issued in response to your request dated February 6, 1991, regarding the proper interpretation and application of the sheriffs' supernumerary law.

### QUESTIONS

With respect to the sheriffs' supernumerary law which is set forth in §36-22-60 through §36-22-65, Code of Alabama 1975, you request an opinion on the following questions:

1. When can a sheriff elect to make contributions into the retirement system established by the supernumerary sheriff's act? Must the decision to begin payroll deduction contributions be made within the first sixty days of his term, or is there any date or time frame in which this decision must be made?

2. What does the sixty-day time limit have reference to in Section 36-22-64, Code of Alabama 1975? Does this time reference mean the sheriff has sixty days from retirement to elect to receive benefits under a particular plan, or does this time limit have reference to payments by the sheriff into the plan?

3. What does the last sentence of Section 36-22-61, Code of Alabama 1975, mean where it is stated:

"This Section shall not apply in any county in which the Sheriff of said County is eligible to become entitled to any other state or county retirement act, which he may elect to come under."

4. What is meant by the word "participate" in Sections 36-22-60 and 36-22-64, Code of Alabama 1975? Does this language have reference to electing to pay into the plan or electing to receive benefits from the plan?

#### FACTS AND ANALYSIS

Your letter relates that you are beginning your third term as the duly elected Sheriff of St. Clair County having previously served as Sheriff for eight years, or two terms, and also having been employed as a Deputy Sheriff for eleven years and five months. You have been participating in the Employees' Retirement System of Alabama since January 9, 1971, and are currently participating in that retirement program. You have recently inquired whether you may contribute to both the Employees' Retirement System and the sheriffs' supernumerary plan and been advised by the Employees' Retirement System that you may not contribute to both. You have been advised that certain provisions of the law governing the Employees' Retirement System would make you ineligible for further participation in that System if you begin contributing to, and participating in, the sheriffs' supernumerary plan.

In interpreting and applying the sheriffs' supernumerary law, and in particular the elections and time limits provided therein, it is important to consider the circumstances which existed at the time that the law was adopted. At that time most sheriffs were participating in the Employees' Retirement System and some had participated for many years and had vested benefit rights. Thus, while it may have been contemplated and hoped that all sheriffs would some day participate in the sheriffs' supernumerary plan, it was desirable to allow those who had accumulated substantial service credit in the Employees' Retirement System the option of continuing such participation and of drawing benefits for that System. Reading the law in its entirety and reading each

section in pari materia with each other section, it is apparent that the Legislature intended that those sheriffs in office at the time that the sheriffs' supernumerary law was enacted should elect at that time whether they wished to participate in the plan and that sheriffs taking office thereafter should elect upon taking office whether they wish to participate in the supernumerary plan. It is clear that each sheriff is to make an election and that a sheriff cannot participate in both plans. This office has so ruled in an advisory opinion dated December 6, 1979, to A. A. Chandler, Chairman, Lamar County Commission, and in an advisory opinion dated May 8, 1980, to Edward W. Enslen, Probate Judge, Elmore County.

Section 36-22-61, Code of Alabama 1975, provides that the governing body of each county begin deducting six percent from each sheriff's salary as a supernumerary contribution but provides in the last sentence of such section that such deduction shall not be made should the sheriff elect to come under some other retirement plan. In your case, by your continued participation in the Employees' Retirement System you elected to participate in the Employees' Retirement System rather than the supernumerary plan.

Section 36-22-64, Code of Alabama 1975, provides that, if a sheriff is eligible for retirement benefits under any other county, state or municipal retirement plan, then he shall elect the plan in which he desires to participate and so notify the proper authority within 60 days after he becomes eligible for payments under the supernumerary law. This statutorily provided 60-day election window specifically applies to eligibility for payment of benefits. It is intended to address those cases where a sheriff may have qualified for benefits under another pension plan prior to the creation of the sheriffs' supernumerary plan or prior to his participation in the sheriffs' super-numerary plan. The essence of this provision is that one cannot receive benefits both from the sheriff's supernumerary plan and from another plan. This section does not, however, address the election between the pension plans as contemplated by §36-22-61, Code of Alabama 1975.

While this office has previously advised that the sheriffs' supernumerary statute required that persons holding office on the date of the adoption of the sheriffs' supernumerary law were required to elect between retirement plans at that time and that sheriffs who took office subsequent to such time should make the election upon assuming office, the statute does not provide a specific time limit for making such election. The Alabama Supreme Court has suggested in Clark v. Houston County Commission, 507 So.2d 902 (Ala. 1987), that a person may elect to participate at any time, but this office has previously advised that a sheriff electing to participate in the supernumerary plan must pay retroactively the contributions which he would have paid from the beginning of his service. Advisory opinion to Edward W. Enslen, May 8, 1980.

CONCLUSION

In answer to the specific questions asked in your request:

(1) Although the statute contemplates that a sheriff shall elect whether to participate in the sheriffs' supernumerary plan upon first assuming office, there is no specific time frame within which this decision must be made;

(2) The 60-day time limit provided in §36-22-64, Code of Alabama 1975, applies only to the election between benefits if a sheriff has vested in another retirement plan prior to joining the sheriffs' supernumerary plan;


(3) At the time of the enactment of the sheriffs' supernumerary law a very few counties had elected to pay sheriff's retirement benefits under the existing sheriffs' retirement system, §36-22-40, et seq., Code of Alabama 1975, under which payment was entirely optional with each county commission and some sheriffs participated in the Employees' Retirement System. The last sentence of §36-22-61, Code of Alabama 1975, recognized participation in these retirement systems and precluded participation in two systems at the same time. This sentence is now obsolete since it has been determined that sheriffs are constitutionally ineligible to receive retirement benefits, except those who may have been grandfathered in by court order (James v. Thompson, 342 So.2d 1178 (Ala. 1981); Brassell v. Bronner, CV-85-1089-G (Cir. Ct. Mtg. Co. 1985));

(4) One "participates" in a retirement plan by either making contributions to such plan, accruing retirement credit under such plan or by receiving benefits from such plan; however, the word "participate" is used in §36-22-60 and §36-22-64, Code of Alabama 1975, to refer only to the receipt of benefits from the supernumerary plan.

I hope and trust that this sufficiently answers your questions.

Sincerely yours,

JIMMY EVANS  
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By:

  
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Chief, Opinions Division

JE:WTS:mbd